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No. 90-707

In The

Supreme Court of the United States

October Term, 1990

DEAN WITTER REYNOLDS, INC.
AND DON L. HARRIS,

Petitioners,

v.

JOAN CHASON ALFORD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STUART M. NELKIN
KATHY D. BOUTCHEE
NELKIN & NELKIN, P.C.
P.O. Box 25303
5417 Chaucer
Houston, Texas 77256
(713) 526-4500
Fax (713) 526-8915
Counsel for Respondent
Joan Chason Alford

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioners have accurately stated the question presented.

PARTIES BELOW

Joan Chason Alford
Dean Witter Reynolds, Inc.
Don L. Harris

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Joan Chason Alford ("Alford") respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 905 F.2d 104 (5th Cir. 1990).

STATEMENT OF THE CASE

Dean Witter Reynolds, Inc. ("Dean Witter") and Don L. Harris ("Harris") have accurately stated the facts in this case with one exception. On page 4 of the petition, Dean Witter and Harris state that Alford was discharged after she proved to be an unsatisfactory employee. This statement is erroneous. Alford was discharged in retaliation for having filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") complaining of discriminatory treatment. In her initial charge of discrimination she complained of repeated acts of harassment and discrimination by Petitioners and that their treatment was because she was female. Almost immediately thereafter she was discharged by Harris. She then filed a second charge of discrimination with the EEOC.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. THE PETITION SHOULD BE DENIED UNDER THE COURT'S DECISION IN *ALEXANDER V. GARDNER-DENVER CO.*, 415 U.S. 36 (1974).

The sole question presented in the petition is whether the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA") requires Alford to submit her claim of discrimination on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), to arbitration. The answer to this question is contained in the unanimous decision of the Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The Court held, after

conducting an exhaustive analysis of the legislative history and text of Title VII, that an employee cannot be compelled to submit a Title VII claim to arbitration pursuant to an agreement to submit employment disputes to arbitration. The Court found that an employee has an absolute right to seek enforcement of his Title VII rights in federal court and that there could be no prospective waiver of Title VII rights. *Id.* at 51-52. The Court specifically found that arbitration was not an adequate substitute for judicial resolution of those rights. The Court should deny this petition because the Fifth Circuit Court of Appeals correctly determined this issue under *Alexander,* and there is no conflict among the Circuit Courts of Appeal concerning whether an employee can be compelled to submit Title VII claims to arbitration.

The Court of Appeals for the Eighth Circuit, in *Swenson v. Management Recruiters International, Inc.,* 858 F.2d 1304 (8th Cir. 1988), *cert. denied,* 110 S.Ct. 143 (1989), was the first appellate court to consider the question of whether an employer could compel the arbitration of a Title VII claim following the Supreme Court's decisions in *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220 (1987) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985). The Court of Appeals in *Swenson* expressly held that federal courts could not defer Title VII claims to arbitration regardless of whether the agreement to arbitrate arises out of a collective bargaining agreement or a commercial agreement to arbitrate. *Swenson,* 858 F.2d at 1307.[1] The Court found the Supreme Court's

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[1] In footnote 9 on page 10 of the petition, Petitioners indicate that *Swenson* concerned only the issue of compulsory

(Continued on following page)

holding in *Alexander* was still applicable and held that there was nothing in either *McMahon* or *Mitsubishi* which would require a contrary result. *Id.*

Likewise, in *Utley v. Goldman Sachs & Co..pany,* 883 F.2d 184 (1st Cir. 1989), *cert. denied,* 110 S. Ct. 842 (1990), the Court of Appeals for the First Circuit held that the plaintiff could not be forced to submit her Title VII claim to arbitration prior to a judicial determination. The Court of Appeals in *Utley* noted that both *McMahon* and *Mitsubishi* recognize that an exception to the presumption of arbitrability exists where Congress has expressed a contrary intent. *Id.* at 186. The Court held that the text of Title VII itself, as well as its legislative history, reveal that Congress intended to preclude prospective waiver of the judicial forum. *Id.* at 186-187.

The Fifth Circuit's opinion in the case at bar is consistent with both of these decisions. As it recognized, the Supreme Court's decision in *Alexander* "appears to rest first on a construction of Title VII." *Alford,* 905 F.2d at 107. *Alexander* clearly prohibits compelling any arbitration of Title VII claims before allowing an employee to proceed to the federal court. *Id.* at 106. Additionally, as the Fifth

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arbitration of a claim filed under a state anti-discrimination statute. However, the Court of Appeals addressed both compelled arbitration of a Title VII claim as well as a claim arising under a state law prohibiting discrimination. The Co irt found an employee could not be forced to submit either claim to arbitration.

Circuit also noted, there are no circuit courts holding to the contrary. *Id.*[2]

II. THE PETITION SHOULD BE DENIED SINCE TITLE VII SUITS FALL WITHIN THE RECOGNIZED EXCEPTIONS TO ARBITRATION OF STATUTORY CLAIMS UNDER RECENT SUPREME COURT DECISIONS.

The Court should deny this petition because Title VII and the Court's opinion in *Alexander* are unaffected by the Court's recent decisions in *McMahon* and *Mitsubishi* concerning arbitration of statutory claims. Neither of these cases involved Title VII claims or even employment related disputes. Instead they arose in the context of business transactions. Further, as the Court has noted "[not] all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi*, 473 U.S. at 427. Both *Mitsubishi* and *McMahon* acknowledge that a person can defeat an attempt to compel arbitration by showing an intent by Congress to prohibit a waiver of the judicial forum. *Id.* at 628; *McMahon*, 482 U.S. at 226-227. This

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[2] The Courts of Appeals have reached similar conclusions when determining whether ERISA claims will be subject to compulsory arbitration. *See Bird v. Shearson Lehman/American Express, Inc.*, 871 F.2d 292 (2d Cir. 1989), *vacated on other grounds*, 110 S.Ct. 225 (1989); *Barrowclough v. Kidder Peabody & Co.*, 752 F.2d 923 (3d Cir. 1985); *Jones v. Baskin, Flaherty, Elliot & Mannino, P.C.*, 670 F.Supp. 597 (W.D. Pa. 1987), *aff'd*, 897 F.2d 522 (3d Cir. 1987), *cert. denied*, 111 S. Ct. 47 (1990); *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). Additionally, the Third Circuit Court of Appeals in *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (8th Cir. 1988) found that the plaintiff could not be required to submit his ADEA claim to arbitration.

Court in *Alexander* has expressly found such an intention exists in both the text of Title VII itself and in its legislative history. Nothing in either *McMahon, Mitsubishi* or subsequent amendments to Title VII alters this conclusion. *See Utley,* 883 F.2d at 186.

CONCLUSION

For these reasons, Respondent Joan Chason Alford respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

NELKIN & NELKIN, P.C.
STUART M. NELKIN
KATHY D. BOUTCHEE
P.O. Box 25303
5417 Chaucer
Houston, Texas 77265
(713) 526-4500
Fax: (713) 526-8915